No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

OCHOA FERTILIZER CORPORATION; LOCAL 1762, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINION BELOW

The court of appeals filed no opinion in support of its original decree (R. 53–54). Its opinion denying the Board's second motion for reconsideration (R. 60–69) is reported at 283 F. 2d 26. The Board's decision and order (R. 37–49) are unreported.

JURISDICTION

The court of appeals entered its decree (R. 53–54) on July 8, 1960, and denied the Board's motion for reconsideration on August 3, 1960 (R. 55). The Board's second motion for reconsideration (R. 56–58) was denied on October 18, 1960 (R. 69). The petition for a writ of certiorari was filed on January 16, 1961,

and granted on March 6, 1961 (R. 70; 365 U.S. 833). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE AND RULE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act, 61 Stat. 146, as amended, 29 U.S.C. 160, and Sections 101.9 and 102.46 of the Statements of Procedure of the National Labor Relations Board, 24 Fed. Reg. 9095, *et seq.*, are set forth in the Appendix, *infra*, pp. 25–29.

QUESTION PRESENTED

Whether the court of appeals erred in modifying a National Labor Relations Board order where the respondents, in a settlement agreement executed prior to hearing, had consented to the order and to its enforcement by the court.[1]

STATEMENT

A. THE BOARD PROCEDURE IN HANDLING UNFAIR LABOR PRACTICES CASES

When an unfair labor practices complaint, issued by the General Counsel of the Board is contested, the case goes to hearing before a trial examiner, who, on the basis of the evidence, issues a proposed report, containing findings of fact and conclusions of law, and a recommended order. Section 10(c) of the Act (App.,

[1] A related question is presented in *Federal Trade Commission* v. *Henry Broch and Company*, No. 74, this Term, set for argument after the present case, 366 U.S. 923.

infra, p. 25) provides that, "if no exceptions are filed within twenty days * * * such recommended order shall become the order of the Board." If exceptions to the trial examiner's report are filed, the case goes to the Board, which considers the matters to which exceptions have been taken.[2] Should the Board conclude that unfair labor practices have been committed, it then issues a decision setting forth its findings and order.

In many cases, however, the parties decide to avoid the time and expense of litigation by entering into either an informal or formal settlement agreement. In ordinary cases an informal agreement is all that is required; it provides for the posting of an appropriate notice, after which the unfair labor practice charges are withdrawn.[3] When the investigation has revealed a flagrant violation of the statute or a history of conduct demonstrating the likelihood of repeated violations, a formal agreement is required. The formal agreement, which is entered into simultaneously with, or just after, issuance of a complaint based on the charges, provides that the Board may, without a hearing or further proceedings, issue a specified order; in addition, it usually provides that the Board may, without contest by the parties, apply to the appropriate court of appeals for entry of a decree enforcing

[2] See Section 102.46, Board Statements of Procedure, App., *infra*, pp. 27–29.

[3] Silverberg, *How to Take a Case Before the National Labor Relations Board* (BNA, 1959), p. 213; see *Poole Foundry & Machine Co.* v. *National Labor Relations Board*, 192 F. 2d 740 (C.A. 4), certiorari denied, 342 U.S. 954.

the Board's order.[4] A formal settlement agreement ordinarily does not require the parties to stipulate particular facts establishing the unfair labor practices.[5]

B. THE CONSENT ORDER ENTERED BY THE BOARD

In the present case, the formal settlement procedure was used. Upon charges filed by an individual employee (R. 1–2, 5–12), a complaint was issued against the respondent company and unions alleging that they had violated, respectively, Sections 8(a) (1), (2) and (3) and 8(b) (1)(A) and (2) of the Act by executing and maintaining an agreement which conditioned employment upon union membership, vested the unions with exclusive control over hiring, and provided for the checkoff of union dues and fees (R. 13–20).

Thereafter, the respondents, the charging party, and the Regional Director entered into a settlement agreement under which the respondents waived "a hearing, an Intermediate Report of a Trial Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board and all further and other proceedings" before the Board (R. 23, par. V), and agreed to the exact terms, and the issuance, of a Board order (1) directing the

[4] Silverberg, *supra*, pp. 222, 228; see Section 101.9, Board Statements of Procedure, App., *infra*, pp. 26–27.

[5] See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 159; *National Labor Relations Board* v. *J. L. Hudson Co.*, 185 F. 2d 380, 384 (C.A. 6), certiorari denied, 320 U.S. 740.

respondent company to refrain from performing, maintaining or giving effect to such an agreement with the respondent unions "or any other labor organization" (R. 24, pars. (a), (b)), and from otherwise unlawfully encouraging membership in respondent unions "or any other labor organization" by discrimination as to hire, tenure, or terms or conditions of employment (R. 25, par. (d)), and (2) directing the respondent unions to refrain from performing, maintaining or giving effect to such an agreement with the respondent company "or any other employer, over which the Board will assert jurisdiction" (R. 27, pars. (a), (b)), and from otherwise causing or attempting to cause the respondent company "or any other employer over which the Board will assert jurisdiction" to discharge, refuse to hire, or otherwise discriminate against any employee in violation of Section 8(a)(3) of the Act (R. 27–28, par. (d)). The stipulation further provided for the posting of notices of compliance, containing references to "any other labor organization" and to "any other employer over which the Board will assert jurisdiction," in accordance with the provisions of the cease and desist order (R. 31–35).

In addition, the stipulation provided that "any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board * * *" issued in accordance with the stipulation, and that "Respondents waive all defenses to entry of the decree * * *" (R. 29, par. VIII).

On March 16, 1960, the Board approved the stipulation and entered an order in the agreed terms, including the references to the respondent unions "or any other labor organization" and the respondent company "or any other employer over which the Board will assert jurisdiction" (R. 37–44). On June 14, 1960, the Board, pursuant to the stipulation, petitioned the United States Court of Appeals for the First Circuit for a decree enforcing the order (R. 50–52).

C. THE DECISION OF THE COURT OF APPEALS

Despite the fact that the scope of the order was contested neither before the Board nor the court, the court, on July 8, 1960, *sua sponte,* modified the Board's order and notice by striking the phrases "or any other labor organization" and "or any other employer over which the Board will assert jurisdiction" wherever they occurred, and enforced the order as modified (R. 53–54). The Board filed a motion for reconsideration which was denied without opinion on August 3, 1960 (R. 55). On August 5, 1960, the Board filed a second motion (R. 56) requesting reconsideration in the light of the Second Circuit's opinion of August 3, 1960, in *National Labor Relations Board* v. *Combined Century Theatres, Inc.,* 46 LRRM 2858 (R. 57–58), which upheld the Board's view that the court was without jurisdiction to modify an order entered pursuant to a stipulation agreement. On October 18, 1960, the court denied the second motion in an opinion covering the pres-

ent case and six others in which it had similarly modified uncontested orders entered by the Board (R. 59–60).* In the course of its opinion, the court referred to previous cases in which the Board had entered broad orders held to be not warranted by the record (R. 62–64). The court thereupon concluded that a broad order could not be justified in the present case when "no evidence is presented by the record" (R. 66), and held that it possessed power, notwithstanding the stipulated settlement agreement, to modify the order, because it regarded (R. 67) " * * * a broad general decree as going to the root of the policies of the Act and rising above the failure of a respondent to save its rights."

SUMMARY OF ARGUMENT

I

The action of the court below is contrary to Section 10(e) of the Act (App., *infra*, p. 2ɔ). Section 10(e) provides that, upon review of a Board order in an appropriate court of appeals, "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." In

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*In addition to the present case, the Board has petitioned for certiorari in two other cases disposed of by the First Circuit's opinion: *National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp.*, No. 38, this Term: *National Labor Relations Board* v. *Local 476, Plumbers*, No. 39, this Term. See also, *National Labor Relations Board* v. *Brandman Iron Company*, No. 35, this Term.

National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U.S. 385, the Court held that, since "Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board" (*id.* at 389), Section 10(e) precludes a court of appeals from narrowing the scope of a Board order which was not contested before the Board. Thus, when no objection to the order is presented to the Board, it has no opportunity to make an evaluation for the reviewing court. Accordingly the court is required to assume that a sufficient basis for the order exists and "render judgment on consent" (*ibid.*).

Neither *National Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, nor *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, supports the court's decree. Contrary to the facts of the present case, the Board in those cases had considered the scope of the orders in the light of the evidence and findings of record before arriving at its ultimate decisions. Section 10(e), therefore, interposed no procedural bar to judicial review on the merits.

Moreover, the court below erred in basing its refusal to enforce the broad order on what it believed to be deficiencies in the record. Although in *Cheney* the evidentiary basis for the order was disclosed in the record, in the present case, since the respondents by agreement had waived a hearing and had failed to stipulate underlying facts, there was no need for evi-

dence or findings of fact to support the consent order. The procedural difference between the two cases—the presence of evidence in one and its absence from the other—has no relevance because in both cases the enforcing court was precluded by Section 10(e) from reviewing the basis of the order.

II

The lack of any evidence or findings of fact cannot serve as a basis for the court to modify an order entered in accordance with the consent of the parties concerned, since, under the rule prevailing in the federal courts, "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause," regardless of whether evidence in the record supports the decree. The court below was therefore in error in reviewing the "merits" of the order.

III

Especially since the *Communication Workers* case, the Board has been alert to insure that broad orders are used only in situations where they are justified by the facts of the particular case. If the court's holding were to be sustained, the effectiveness of the consent procedure, by which the Board handles much of its caseload, would be seriously weakened. Since respondents are usually unwilling to stipulate to the underlying facts supporting the conclusions of law as to unfair labor practices, the consequence of the position taken by the court is that no broad order, however appropriate in the circumstances, could be ob-

tained without formal litigation, even though the respondents should not wish to litigate.

ARGUMENT

I

THE FACT THAT NO OBJECTION TO THE ORDER WAS URGED BEFORE THE BOARD PRECLUDED THE COURT BELOW FROM REVIEWING THE ORDER ON THE MERITS

A. The action of the court below is contrary to Section 10(e) of the National Labor Relations Act

Although Section 10(e) of the Act (App., *infra*, p. 26) empowers a court of appeals to enforce, modify or set aside a Board order, that Section also imposes a qualification on the court's authority, in that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." See *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388. In the *Cheney* case, the Court explained this qualification (*id.* at 389 (emphasis added)): "By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render *judgment on consent* as to all issues that were contestable before the Board but were in fact not contested." Accordingly, when an unfair labor practice case has gone to a hearing and the trial examiner has issued an intermediate report recommending a remedial order, any objections to the examiner's findings of fact or conclusions of law, or to any portion of his recommended order, not challenged before the Board by specific,

timely exceptions are deemed waived and may not be reviewed by the court in subsequent proceedings to enforce the Board's order, absent a showing of extraordinary circumstances which excuse the failure to take exceptions.[7] Moreover, when no timely exceptions are filed, the recommended order, by virtue of Section 10(c) of the Act (App., *infra*, p. 25) automatically becomes the order of the Board.[8] Since no part of the

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[7] See, *e.g.*, *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, n. 5; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *National Labor Relations Board* v. *Pinkerton's Nat'l Detective Agency*, 202 F. 2d 230, 232–233 (C.A. 9). See, also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496–501; *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

[8] Section 10(c) was added to the Act in 1947. Its purpose was explained by Senator Taft, as follows (93 Cong. Rec. 6860, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1625)):

> Section 10(c): In an effort to lessen the work load of the Board and facilitate its disposition of cases this subsection was amended to give finality to recommended orders of trial examiners without Board review if no exceptions were taken within 20 days. It has been stated that this permits an unsuccessful litigant to stand idly by while an erroneous report of a trial examiner becomes the order of the Board and then embarrass the Board when the case goes into the courts for enforcement. Several checks would prevent this happening. Section 10[(e)] provides, "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court." In addition, the attorney trying the case would presumably file exceptions to such a report and the General Counsel in any event would not go forward with enforcement if the order was erroneous.

trial examiner's findings or order is open for Board consideration, none is open for court review (at least absent a showing of extraordinary circumstances for the failure to take exceptions), and the court is required summarily to enforce the order.[9]

It is of course true, as the Court pointed out in the *Cheney* case (327 U.S. at 388), that the absence of exceptions does not require the court to render a decree "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." Thus, the Court may examine the record to satisfy itself that the Board has jurisdiction over the unfair labor practices in question, that the proceedings before the Board were regular, and that the Board was acting within the general scope of its powers under the Act.[10] But, the court may not go further and inquire, for example, into the propriety of the breadth of a particular order entered by the Board, where timely exceptions have not been filed with the Board. *National Labor Relations Board* v. *Cheney California Lumber Co., supra.*

In the *Cheney* case, the trial examiner, after hearing, issued a report finding that the employer had engaged in unfair labor practices and recommending

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[9] See *National Labor Relations Board* v. *Ulin Box and Lumber Co.* (C.A. 7), unreported order entered April 9, 1948; *National Labor Relations Board* v. *Davis Lumber Co.* (C.A. 5), 172 F. 2d 225 (C.A. 5); *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Auburn Curtain Company*, 193 F. 2d 826 (C.A. 1).

[10] See *National Labor Relations Board* v. *Auburn Curtain Company*, *supra.*

that an order issue requiring him to cease and desist from the conduct found and from interfering "in any other manner" with his employees' organizational rights. The employer filed no exceptions to the examiner's report, and the Board thus adopted the examiner's proposed findings and order. In proceedings to enforce the order, the court of appeals, believing that the prohibition against interfering "in any other manner" with the rights of the employees was too broad under the rule established in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, deleted that provision, even though no objection to the phrase had been filed with the Board. This Court reversed, holding that the modification of the order was barred by Section 10(e). Since, in the present case, no objection to the broad order was urged before the Board, the court of appeals was similarly barred under Section 10(e) from modifying the order.

B. Neither the Express Publishing case nor the Communications Workers case supports the court's decree

The court below attempted to find support for modifying the Board order (R. 64–65) in the decisions of this Court in *National Labor Relations Board* v. *Express Publishing Co., supra,* and *Communications Workers* v. *National Labor Relations Board,* 362 U.S. 479. But neither case supports the decree below. In *Communications Workers,* the Board, upon concluding that the union had restrained the employees of Ohio Consolidated Telephone Company, in violation of Section 8(b)(1)(A) of the Act,

ordered the union to cease and desist from engaging in such conduct with respect to the employees of Ohio or "any other employer." Because the record did not show that the union had engaged in, or was likely to engage in, similar misconduct against the employees of other employers, this Court found that, under the principles earlier enunciated in *Express Publishing,* there was insufficient basis for the "any other employer" provision, and accordingly deleted it. Contrary to the situation in the present case, however, in both *Express Publishing* and *Communications Workers,* the Board had specifically considered the scope of the orders, in light of the evidence and findings of record, before arriving at its ultimate decisions. Section 10(e), therefore, interposed no bar to the review of those orders by the courts. The fact that a court may have power to set aside an order in circumstances in which there is no procedural bar to its action does not establish that a court may do likewise when such a bar exists.[11]

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[11] All of the other circuits which have had occasion to consider the problem, with the exception of one panel in the Sixth Circuit (*National Labor Relations Board* v. *Brandman Iron Co.*, 281 F. 2d 797 (C.A. 6), pending on petition for certiorari, No. 35, this Term) have agreed that nothing in *Express Publishing* or *Communications Workers* may be construed as permitting the court to modify a Board order which was not contested before the Board. See *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F. 2d 642, 646–647 (C.A. 2); *National Labor Relations Board* v. *Combined Century Theatres, Inc.*, 46 LRRM 2858 (C.A. 2) (R. 57–58); *Carpenters District Council of Detroit* v. *National Labor Relations Board*, 285 F. 2d 289, 294 (C.A. D.C.); *National Labor Relations Board* v. *Murray Ohio Mfg. Co.*, 279 F. 2d 686 (C.A. 6). See, also, *National*

C. The fact that no objection to the order was urged before the Board precluded the court from modifying the order, even though there was no evidence or factual findings of record to support the order

The court below attempted to distinguish the *Cheney* case on the ground (see R. 64, 66) that here there was nothing in the record to sustain a finding that there would be similar misconduct directed toward other employers or labor organizations, whereas in *Cheney* (R. 66) "[t]he court * * * was careful to point out that findings of record disclosed a 'course of conduct against which such an order may be the only proper remedy.' * * * [327 U.S.] at 389."[12] It is true that in *Cheney*, the evidentiary basis for the order was disclosed in the record. In the present case, however, there was a consent order and a settlement agreement in which the respondents failed to stipulate any facts and specifically dispensed with a full record by waiv-

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Labor Relations Board v. *United Hatters, Cap & Millinery Workers International Union, AFL–CIO*, 288 F. 2d 436 (C.A. 6), on rehearing, scope of order held in abeyance pending decision in the present case, 48 LRRM 2295, 2296–2297 (June 6, 1961).

[12] The Court in *Cheney* did not make an independent finding that the evidence supported the order, as the court below implied, but merely observed that the Board had so found, *i.e.*, the Trial Examiner had made the findings and the Board, in the absence of objection to the findings, had adopted the Examiner's recommended order (see *supra*, pp. 2–3, 10–12). As the Court stated, the order "depends * * * upon evidence found by the Board disclosing a course of conduct against which such an order may be the only proper remedy. The Board here so found." (327 U.S. at 389.) But judicial review of the Board's finding was precluded by the fact that no objection had been urged before the Board (see *infra*, pp. 16–17).

ing "a hearing, an Intermediate Report of a Trial Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board, and all further and other proceedings" before the Board (R. 23, par. V; see the Statement, *supra*, p. 4). The Board was entitled to assume from the stipulation that all the necessary underlying facts were conceded and it itself therefore had no occasion or even opportunity to make findings of fact which could serve as a foundation of the order. The procedural difference between the two cases has no relevance, because, in both cases, the enforcing court was precluded under Section 10(e) from reviewing the evidentiary basis of the orders. As the Court in *Cheney* pointed out (327 U.S. at 389), although the "justification" for a broad order "necessarily involves consideration of the facts which are the foundation of the order * * *," the justification

> * * * is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection * * *." Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.[13]

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[13] The only member of the Court in *Cheney* with a different view was Chief Justice Stone who believed that Section 10(e) did not render "the court powerless to frame its own injunction consistently with the record, on which that section requires it to

In summary, the situation here is analytically indistinguishable from *Cheney*. Here, as there, the court of appeals deleted those provisions of the Board's order which it thought unduly broad; those provisions were not necessarily beyond the Board's powers, and would be appropriate under certain circumstances.[14] By failing to contest the order before the Board, the parties in effect agreed that the facts warranted the order and waived their opportunity to have the Board pass on the question. Section 10(e) therefore barred the court of appeals from modifying the order on its own motion.

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act, and in conformity to accepted principles governing the scope of the injunction * * *," but instead was merely "a limitation upon the court's review of the grounds for granting or denying relief" (327 U.S. at 390). Accordingly he sustained the Board's order only after being satisfied, on a review of the record, that a broad order was warranted by the facts presented. Similarly, in the present case, the court of appeals maintained that the "order, when implemented by us, becomes an injunction" (R. 64) and an "injunction broader than the need is not only contrary to established equitable principles, but it is peculiarly inappropriate in the sensitive area of labor relations" (R. 66).

[14] If, for example, evidence were presented which disclosed that the unions here had a consistent policy of requiring all employers in the industry to limit employment to union members, an order prohibiting the unions from engaging in such illegal conduct with respect to the employer involved and "any other employer" would be appropriate. See, *e.g.*, *National Labor Relations Board* v. *Springfield Building and Construction Trades Council*, 262 F. 2d 494, 498–499 (C.A. 1); *National Labor Relations Board* v. *Brewery and Beer Distributor Drivers*, 281 F. 2d 319, 322–323 (C.A. 3).

II

THE FACT THAT THE BOARD'S ORDER WAS ENTERED WITH THE CONSENT OF ALL THE PARTIES PRECLUDED THE COURT BELOW FROM REVIEWING THE ORDER ON THE MERITS

The lack of any evidence or findings of record cannot serve as a basis for the court to modify a Board order entered in accordance with the consent of all parties concerned. Under the practice prevailing in the federal courts, the scope of review of a consent decree is limited to such questions as whether, as a matter of fact [15] or as a matter of law,[16] there is a lack of consent to the decree; whether the decree is invalid for lack of jurisdiction, particularly lack of jurisdiction over the subject matter;[17] whether the consent was obtained by collusion, fraud [18] or mistake;[19] or whether the circumstances which warranted the decree had changed.[20]

But no errors pertaining to the consent decree, which were in law waived by the consent, may be considered on appeal, even though the errors may be

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[15] *Swift & Co.* v. *United States*, 276 U.S. 311, 324; see *Pacific R.R. Co.* v. *Ketchum*, 101 U.S. 289, 295; *Walling* v. *Miller*, 138 F. 2d 629 (C.A. 8), certiorari denied, 321 U.S. 784.

[16] See *Laughlin* v. *Berens*, 118 F. 2d 193 (C.A.D.C.); *In re 4145 Broadway Hotel Co.*, 100 F. 2d 7 (C.A. 7).

[17] See *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; *Pacific R.R. Co.* v. *Ketchum*, *supra*, 101 U.S. at 297.

[18] *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; see *Thompson* v. *Maxwell Land Grant Co.*, 168 U.S. 451, 463; *Thompson* v. *Maxwell Land Grant Co.*, 95 U.S. 391, 398.

[19] *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 324; see *Wisconsin* v. *Michigan*, 295 U.S. 455, 460.

[20] See *Swift & Co.* v. *United States*, 286 U.S. 106, 114–115.

obvious from the record.[21] Thus in *Swift & Co.* v. *United States*, 276 U.S. 311, 324, and in *Nashville, C. & St. L. Ry. Co.* v. *United States*, 113 U.S. 261, 266, this Court enunciated the rule, which now prevails in the federal courts, that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." See also *Swift & Co.* v. *United States, supra*, 276 U.S. at 327, 328.

The present case, when the settlement stipulation was approved by the Board, stood in the same posture as though a consent decree had been entered in a judicial proceeding. Since the scope of the order was not jurisdictional and had no relevance to considerations of consent, collusion, fraud, mistake or changed circumstances, the court below erred in reviewing this question. Its action was tantamount to what this Court found in *Swift* should not be done—setting aside or modifying the decree because of its broad scope.

III

IF THE SCOPE OF A CONSENT ORDER WERE OPEN FOR REVIEW ON THE MERITS, THE EFFECTIVENESS OF THE CONSENT PROCEDURE, BY WHICH THE BOARD HANDLES MUCH OF ITS CASELOAD, WOULD BE SERIOUSLY WEAKENED

1. The consequence of precluding a court from reviewing consent orders on their merits is not as

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[21] *Pacific R.R. Co.* v. *Ketchum*, *supra*, 101 U.S. at 295; see, *e.g.*, *Indianapolis, D. & W. Ry. Co.* v. *Sands*, 133 Ind. 433, 32 N.E. 722.

severe as the court below suggests (see R. 67 & n. 6). Long before the *Communications Workers* decision, *supra*, regional officers, who normally negotiate consent decrees, frequently narrowed the scope of proposed orders whenever the respondent was able to establish to the satisfaction of the Regional Director that a broad order was not warranted under the circumstances of the case,[22] and cases have rarely been forced to full hearing over the scope of the order.[23] Since the *Communications Workers* decision, the Board and its agents have been even more alert to insure that broad orders are used only in situations where they are justified by the facts of the particular case.[24]

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[22] Section 10124.3 of the case-handling manual issued to Board field personnel provides that "the remedy provided for in a settlement must not exceed that which would be expected from a fully favorable Board decision."

[23] Where the phrasing of the order is the only thing which blocks settlement, the parties will often stipulate to everything but the proper scope of the order to be entered and submit that issue directly to the Board for resolution without a hearing or intermediate report. See, e.g., *Local Union 522, Lumber Drivers (Republic Wire Corp.)*, 129 NLRB No. 45, 46 LRRM 1551.

[24] See *Central Rigging and Contracting Corp.*, 129 NLRB No. 37, 46 LRRM 1548, 1549; *Combustion Engineering*, 130 NLRB No. 24, 47 LRRM 1301, 1302; *International Hod Carriers, Local 78 (Knowlton Construction Co.)*, 129 NLRB No. 72; *International Brotherhood of Boilermakers, Local 154 (Cuyahoga Wrecking Co.)*, 129 NLRB No. 113, 47 LRRM 1093, 1094; *Pipe Fitters Local 392 (Alco Products)*, 130 NLRB No. 50, 47 LRRM 1354, 1356; *International Union, United Automobile, Aircraft, Agricultural Implement Workers of America, AFL-CIO and Local 899 (John I. Paulding, Inc.)*, 130 NLRB No. 96; *Dal-Tex Optical Co.*, 130 NLRB No. 142; cf. *United Ass'n of Journeymen, Local 469 (W. D. Thomas*

2. On the other hand, the consequence of the position taken by the court below is that no broad order, however appropriate in the particular circumstances, may be obtained without formal litigation, unless the parties stipulate not only to conclusions but also to subsidiary facts. The court acknowledged this consequence in its opinion (R. 68):

> * * * All the Board has to do is to obtain from the respondent a stipulation disclosing facts which warrant broad relief. We will not go behind evidence which the parties state to be so. On the other hand, if the respondents are unwilling so to stipulate, there is no reason for the Board to complain that it cannot have such an injunction without a hearing.

To require that the parties "admit" facts, as a condition for accepting a consent decree, would seriously cripple the effectiveness of the consent procedure.[25] As the Attorney General's Committee on Administrative Procedure pointed out in its final report, respondents are often willing to cease specific

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Construction Co.), 130 NLRB No. 129, 47 LRRM 1484, 1485; *Local Union 522, Lumber Drivers* (*Republic Wire Corp.*), 129 NLRB No. 45, 46 LRRM 1551; *General Drivers, Chauffeurs and Helpers, Local Union No. 886* (*ADA Transit Mix*), 130 NLRB No. 55; *Highway Truckdrivers and Helpers Local No. 107, Teamsters* (*Riss & Co., Inc.*), 130 NLRB No. 91; *Teamsters Union* (*Overnite Transportation Co.*), 130 NLRB No. 108, 47 LRRM 1400, 1402–1403; *Teamsters, Local 810* (*Advance Trucking Corp.*), 131 NLRB No. 10, 47 LRRM 1591, 1593; *Teamsters, Local 294* (*Van Transport Lines, Inc.*), 131 NLRB No. 42, 48 LRRM 1026, 1029.

[25] The importance of consent orders in the administration of the Act is shown by the statistics set forth at pp. 11 and 12 of the Board's petition in *National Labor Relations Board* v. *Brandman Iron Company*, No. 35, this Term.

practices, but at the same time may be unwilling to admit alleged facts "either because they import illegal conduct or because of fear that the admission might be used against them in private litigation." S. Doc. No. 8, 77th Cong., 1st Sess., p. 42. The Committee, in approving of the Board's policy of not requiring factual admissions, specifically stated (*ibid.*): "From the point of view of both the public and the private interest, it seems highly desirable in cases of this sort to permit consent to the entry of an enforceable order without requiring admissions." [**]

In summary, the decision below is out of harmony with the general policy of encouraging settlement agreements and avoiding costly and time-consuming litigation. As the Sixth Circuit stated: "Hindrance rather than aid would be given to expeditious and inexpensive procedure before the National Labor Relations Board were the Courts of Appeals * * * to say that * * * [a respondent] may not lawfully waive the requirement which would otherwise exist, that the Board make findings of fact with respect to unfair labor practices, or that the antagonists may not stipulate concerning the order to be entered by the Board, with its approval." *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 384 (C.A. 6), cer-

[**] On the other hand, the Federal Trade Commission has been criticised for its insistence on factual stipulations in consent settlements, on the ground that findings of fact in such situations "are not only unnecessary but act as a deterrent to the accomplishment of greater compliance by voluntary means." See 1 Davis, *Administrative Law Treatise*, § 4.02, at p. 239 (1958). The FTC has since abandoned this requirement.

tiorari denied, 320 U.S. 740. See, also, Administrative Procedure Act, Sec. 5(b), 60 Stat. 239, 5 U.S.C. 1004(b). Moreover, the holding of the court of appeals is contrary to the settled principle that the voluntary solution of the parties, particularly when embodied in an order or decree which there was both jurisdiction and power to enter, should not be rewritten by the court on review.[27]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case should be remanded with directions to enter a decree enforcing the Board's order without modification.

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AUGUST 1961.

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[27] See *Swift & Co.* v. *United States*, *supra*, 276 U.S. at 330–331; *Swift & Co.* v. *United States*, *supra*, 286 U.S. at 116–117, 119; *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298–299 (C.A. 1); *National Labor Relations Board* v. *Retail Clerks, Local 648*, 203 F. 2d 165, 170 (C.A. 9); *National Labor Relations Board* v. *American Mfg. Co.*, 132 F. 2d 740, 742 (C.A. 5); cf. *United States* v. *Wunderlich*, 342 U.S. 98, 100–101.

APPENDIX

National Labor Relations Act

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has or may be established by agreement, law or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented befor a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners * * * shall issue * * * a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof * * * such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD

SEC. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment,

except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington, D.C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulations also contain the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

* * * * *

SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and section 102.113 and section 102.114 of these rules) file with the Board in Washington, D.C., seven copies of a statement in writing setting forth excep-

tions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation *of page and line* the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties. Requests for an extension must be received by the Board 3 days prior to the due date.

(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.

(c) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions filed pursuant to the provisions of paragraph (a) of this section with proof of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(d) Oral arguments are limited to 30 minutes for each party entitled to participate. No request for

additional time will be granted unless timely application is made in advance of oral argument.

(e) Exceptions to intermediate reports and recommended orders, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders shall be legibly printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

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